117 (2)

No. 08-790

Supreme Court, U.S.
FILED
JAN 2 1 2009
OFFICE OF THE CLERK

In the Supreme Court of the United States

DELMARVA POWER & LIGHT COMPANY AND
ATLANTIC CITY ELECTRIC COMPANY,
Petitioners,

v.

UNITED STATES AND
PSEG NUCLEAR, LLC AND
PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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January 21, 2009

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Supreme Court Rule 37.3(b), the National Association of Regulatory Utility Commissioners (NARUC) respectfully requests leave to file this *amicus curiae* brief in support of Petitioners.

On January 6, 2009, NARUC solicited the consent of all parties to the filing of this brief. Written consent was provided by counsel for the Petitioners and by the Solicitor General for Respondent United States. However, counsel for Respondents PSEG Nuclear, LLC and Public Service Electric and Gas Company called NARUC's counsel and indicated he would not respond in writing to NARUC's request.

NARUC's members are State government agencies in all fifty States, the District of Columbia, and U.S. territories. NARUC has been recognized by both Congress and Courts as a proper representative of State commission interests.

The majority of NARUC's members are charged by State law with oversight of electric retail rates. Some are also charged with approving, with conditions, nuclear plant sales like the one that is the subject of Petitioners' request.

NARUC is well positioned to advise the Court as to the probable broad impact of its decision on retail rates and the public interest.

The costs of on-site storage of nuclear waste that the federal government has contracted to remove are significant. Those costs are reflected directly in diminished price Petitioners received for the sale of plant that is subject of the writ for certiorari. There is no question this impacts ratepayers. If the petition for certiorari is denied, NARUC's member State commissions' ability to protect the public interest will be undermined. Indeed, it is precisely because of the probable impact that NARUC was directed by its members to file an *amicus* brief supporting Petitioners. NARUC's *amicus* will be concise and bring to the Court's attention relevant details not otherwise covered in the original Petition. We respectfully request that the Court grant this motion.

Respectfully submitted:

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QUESTION PRESENTED

Whether the United States may consent via waiver to the assignment of a takings claim without complying with the express terms of the Claims Act, 31 U.S.C. § 3727(a)(1)?

PARTIES TO THE PROCEEDING

The parties to the proceedings before the United States Court of Appeals for the Federal Circuit were Delmarva Power & Light Company and Atlantic City Electric Company, Plaintiffs-Appellants below; the United States, Defendant-Appellee below; and PSEG Nuclear, LLC and Public Service Electric and Gas Co., also Defendants-Appellees below.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to U.S. Sup.Ct. Rule 29.6, NARUC states, as follows: NARUC is a quasi-governmental non-profit association incorporated in the District of Columbia. NARUC has no parent corporation nor is there any publicly held corporation that owns stock or other interest in NARUC. NARUC is supported predominantly by dues paid by its State public utility commissioner members and through revenues generated by meetings of those members held three times each year.

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INTEREST OF AMICUS CURIAE[1]

The National Association of Regulatory Utility Commissioners ("NARUC"), founded in 1889, is a national organization whose members include the agencies in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands charged with regulating the rates and conditions of service associated with the intrastate operations of electric, natural gas, water, and telephone utilities. NARUC's members ensure that electric utility services are provided at rates and conditions that are just, reasonable and nondiscriminatory.

Both Congress[2] and federal courts[3] have consistently recognized NARUC as a proper entity

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[1] Pursuant to S. Ct. R. 37.6, amicus states that no counsel for a party authored this brief in whole or in part, and that no counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief.

[2] See 47 U.S.C. § 410(c) (1971) (Congress designated NARUC to nominate members to Federal-State Joint Boards to consider issues of concern to both State regulators and the Federal Communications Commission on universal service, separations, and other issues); See also 47 U.S.C. § 254 (1996) (describing functions of the Joint Board on Universal Service). See also *NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (where the Court explains "Carriers, to get the cards, applied to [NARUC], an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations the ICC issued to create the "bingo card" system).

[3] See *United States v. Southern Motor Carrier Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), aff'd 672 F.2d 469 (5th Cir. 1982), aff'd en banc on reh'g, 702 F.2d 532 (5th Cir. 1983), rev'd on other grounds, 471 U.S. 48 (1985).

to represent the collective interests of the State utility commissions.

The Nuclear Waste Policy Act (NWPA), enacted in 1982, made the federal government responsible for safe disposal of high-level radioactive waste, including spent nuclear fuel. Under the Act, utilities pay for the eventual disposal of commercial nuclear waste through the Nuclear Waste Fund (NWF), which is, in turn, passed through to ratepayers.

Although utilities and their ratepayers continue to pay these charges, the Department of Energy (DOE), which manages the disposal program, has failed to meet its statutory and contractual obligation to begin waste acceptance by 1998. *Meanwhile, spent fuel accumulates at 72 locations in 35 States at sites that were never intended for long-term storage.*

It is obvious, since 1998, this requirement to maintain on-site storage – and the continuing uncertainty of when DOE will finally accept this waste – has had a significant impact on the valuation of utility property.

Ratepayers ultimately bear the cost of fees paid to the federal government by utilities that provide electricity from nuclear sources. Over $29 billion in fees and interest has been collected since 1983 to eventually pay for permanent disposal of spent nuclear fuel from commercial nuclear power plants.

Ratepayers are also directly impacted when nuclear facilities – whose valuation has been significantly diminished by DOE's inaction – are sold or transferred.

State Commissions, like their federal colleagues,[4] are charged with protecting ratepayers from excessive electricity prices. One tool NARUC's member commissions use is careful oversight and approval of the sales of utility assets.

The impact on retail electricity rates of sales of devalued nuclear facilities can be significant and varied. A buyer's recognition of the ongoing costs of waste storage that DOE should have already taken, necessarily reduces the price paid for these assets. That price, in turn, limits the size of any phased ratepayer refunds.[5]

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[4] See *Pa. Water & Power Co. v. Fed. Power Comm'n*, 343 U.S. 414, 418, 72 S.Ct. 843, 96 L.Ed. 1042 (1952) ("A major purpose of the [Federal Power] Act is to protect power consumers against excessive prices."); see also *Atl. Ref. Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 388, 79 S.Ct. 1246, 3 L.Ed.2d 1312 (1959) ("The [Natural Gas] Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates.").

[5] Compare, Nov. 9, 2005 Order Denying Petition, Rejecting Proposals To Institute Investigations, And Providing For Alternative Relief, CASE 05-G-1209, *New York State Electric & Gas Corp. and Rochester Gas and Electric Corp. Petition for Authorization for Funds to Provide Emergency Financial Aid to Low-Income Natural Gas Heating Customers During the 2005-06 Winter Season*, at 2, available at: http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/Web/CED7F4503EAB1FE7852570B40054ED44/$File/05g1209_11_09_05.pdf?OpenElement, where the New York commission rejected a utility request to accelerate "disposition of a $10.0

Long after the sale, losses from an undervalued sale can potentially increase rates to reflect deferred taxes and depreciation associated with the sales.[6] Finally, such losses can also significantly increase ratepayer liability for stranded costs.[7]

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million refund, from the proceeds of the 2004 sale of its Ginna nuclear . . . facility, due to its electric customers under its existing five-year Rate Plan."

[6] See "*Public Advocate Says Atlantic Electric's Proposal Would Cost South Jersey Ratepayers More*," August 16, 2007 release, from the New Jersey Public Advocate, available at: http://www.nj.gov/publicadvocate/news/2007/approved/070815_atlantic_electric_divest.html, which urged the Board of Public Utilities (a NARUC member) to deny a utility's request to increase costs recoverable from ratepayers:

> "***The costs at issue arose from losses upon the sale in 2000 of Atlantic Electric's interest in nuclear generating units. An expert . . . found that the proposal would increase costs to ratepayers by $91.5 million***. . . The proceeding involves the treatment of federal income tax benefits related to deferred taxes and the depreciation practices associated with the sale of Atlantic's interest in the Hope Creek, Salem, and Peach Bottom nuclear generating units." {emphasis added}

[7] See Feb. 18, 2000 *Preliminary Statement of the Division of the New Jersey Ratepayer Advocate Regarding the Proposed Sale of Nuclear Generation Assets in BPU Docket No. EM99110870*, at <http://www.rpa.state.nj.us/acenuc.htm>, expressing concern about the "extent to which the sales price reflects a true market value of the assets," and "Atlantic's request that the Board find that the Company may recover the Eligible Stranded Costs associated with the nuclear asset sale." He states:

NARUC's member commissions have a vital interest in the outcome of this case. As Petitioners point out, there are at least five other utilities – *representing the interests of more than three million ratepayers* – that have both sold interests in nuclear properties and also brought takings claims against the Government. Pet. Br. at 3-4. Other sales are possible. This case presents fundamental questions regarding a federal court's ability to ignore both Congress's explicit instructions in the Claims Act, 31 U.S.C. § 3727, as well as this Court's clear precedent in *United States v. Dow*, 357 U.S. 17 (1958) (*Dow*). It presents a question of law central to the responsibility of State regulators to balance the interests of retail customers and utilities. This Court should grant the writ.

> "*Atlantic has admitted that the sales price that it negotiated is far below the market value that Atlantic claimed existed for these same ownership interests during the stranded cost proceedings.* This difference would produce a significant increase in stranded costs, which Atlantic requests be fully recovered from its customers. If the Board approves the sale, it should adopt an appropriate ratemaking adjustment to ensure that Atlantic's customers are not burdened with increased stranded costs from the sale of its interest in Peach Bottom, Salem, and Hope Creek . . . the Board must ensure that New Jersey customers . . . are not forced to pay higher stranded cost charges due to an incorrect or incomplete calculation of the net proceeds, or by [the] decision to sell . . . at a substantial loss." {emphasis added}

SUMMARY OF ARGUMENT

"[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank v. Germain*, 503 U.S. 249 at 253-4(1992), The text of the Claims Act, 31 U.S.C. § 3727, is clear. Even the decision below expressly concedes the language applies to the circumstances presented. Pet. Br. App. at 6(a). If the Federal Appeals Court had stopped its analysis with that concession, its holding would have been on all fours with this Court's decision in *Dow*, 357 U.S. 17, 18-21 (1958), which specifies that compensation for a taking is due the original property owner. It did not. Instead, the Court accepts a solution created *sui generis* by the Court of Claims: a government waiver – referenced nowhere in the statute – that permits an assignment of a claim. It is worth noting that no waiver is needed to *allow* an assignment of a claim, just government compliance with the provisions of the statute. Compliance is absent in the case at bar. The effect of this ruling is to extinguish the original owner's takings claim by the government through its transfer to a party that cannot pursue it. That result cannot be squared with text of either the Claims Act or the Fifth Amendment command that private property cannot be taken for public use without just compensation. Pet. Br. App. At 41(a).

ARGUMENT

Mindful of the admonitions of U.S. Sup. Ct. Rule 37 concerning original material potentially helpful to the Court, NARUC, to avoid repetition, fully endorses Petitioners' arguments. It is clear the decision below ignores this Court's precedent on the Claims Act. It is also clear that the outcome is not tenable. No court should allow any government to eviscerate an otherwise valid claim of uncompensated government confiscation by forcing the assignment of a takings claim to a purchaser who cannot pursue the claim. Aside from this specific endorsement of Petitioners' arguments, NARUC also offers the following:

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE FEDERAL CIRCUIT'S DECISION CONFLICTS WITH THE PLAIN LANGUAGE OF THE CLAIMS ACT AND LEADS TO AN UNACCEPTABLE OUTCOME

The touchstone for understanding any statute is Congressional intent. As this Court consistently points out:

> "[I]n interpreting a statute a court should always turn to one cardinal canon before all others. . . .[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. See, e.g., *United States v. Ron Pair Enterprises, Inc.*, 489 U. S. 235, 241-

> 242 (1989); *United States v. Goldenberg*, 168 U. S. 95, 102-103 (1897); *Oneale v. Thornton*, 6 Cranch 53, 68 (1810). When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete." *Rubin v. United States*, 449 U. S. 424, 430 (1981)." {emphasis added}[8]

The Claims Act is crystal clear. It states plainly that "[a]n assignment of any part of a claim against the United States Government . . . may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued." 31 U.S.C. § 3727(b).[9]

Even the authors of the decision below concede that:

> On its face, this language covers the assignments of the takings claims. The claims had not been allowed (indeed, the government contested them), their amount was undecided, and no warrant for their payment had been issued. Id.

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[8] *Connecticut National Bank v. Germain*, 503 U.S. 249 at 253-4(1992), See also *Caminetti v. U.S.*, 242 U.S. 470 (1917), reasoning "the meaning of a statute must . . . be sought in the language in which the act is framed, and if that is plain... the sole function of the courts is to enforce it according to its terms."

[9] See *Delmarva Power & Light Co. v. United States*, 542 F.3d 880 (Fed. Cir. 2008) (Delmarva) Pet. Br. App. at 6(a).

If the Federal Appeals Court had stopped its analysis there, its holding would have been on all fours with this Court's decision in *Dow*, 357 U.S. 17, 18-21 (1958), which specifies that compensation for a taking is due to the original property owner.[10] It did not. Instead, the Court accepts a solution created *sui generis* by the Court of Claims: a government waiver – referenced nowhere in the statute – that permits an assignment of a claim. It is worth noting that no waiver is needed to *allow* an assignment of a claim, just government compliance with the provisions of the statute. Compliance is absent in the case at bar.

Based on its perfunctory analysis of two decisions, *Tuftco Corp. v. United States*, 614 F.2d 740 (Ct. Cl. 1980), and *Maffia v. United States*, 163 F. Supp. 859 (Ct. Cl. 1958), which the Judges concede *are based on different statutory text dealing with the assignment of contracts (not claims)*, the court below concludes that there is "no valid reason why the government should not also be able to waive the [Claims] Act's prohibition in section 3727(a)." Pet. Br. App. at 6a-8a There is no reliance on any jurisprudence actually based on the Claims Act – and – in spite of Petitioners' direct reliance on Dow – it warrants no mention in the decision below. As Petitioners accurately points

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[10] In *Dow*, the issue was whether the compensation claim vested in those that owned the property when the "taking" (by eminent domain) of an easement occurred or with a later owner in possession when the government filed a declaration of taking. This Court held the attempt to convey the claim to the second owner failed because the Claims Act "prohibits the voluntary assignment of a compensation claim against the Government for the taking of property." Id.

out, Pet. Br. at 9-10, the effect of this ruling is to extinguish the original owner's takings claim by the government through its transfer to a party that cannot pursue it. That result cannot be squared with text of either the Claims Act or the Fifth Amendment command that private property cannot be taken for public use without just compensation. Pet. Br. App. At 41(a).

CONCLUSION

For these reasons, the writ should be granted.

Respectfully Submitted,

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